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## Letter dated 26 September 2000 from the Secretary-General addressed to the President of the Security Council

I am transmitting to you herewith for consideration, and for consideration by the members of the Security Council, a letter dated 19 September 2000 addressed to me by Judge Claude Jorda, President of the International Tribunal for the Former Yugoslavia.

In his letter, Judge Jorda indicates that, according to the Judges of the International Tribunal for the Former Yugoslavia, the Tribunal should be able, in certain situations, to compensate persons who may have been wrongfully detained, prosecuted or convicted by the Tribunal.

Judge Jorda notes that, according to the Judges, there are three situations in which the Tribunal should be able to award such compensation.

The first situation arises when a person has suffered punishment as a result of a final decision of the International Tribunal and that decision is subsequently reversed by the Tribunal or a pardon is granted, because a new or newly discovered fact proves that there has been a miscarriage of justice.

The second situation arises when a person who has been detained under the Tribunal's authority is subsequently acquitted by a final decision of the Tribunal or is subsequently released following a decision to terminate the proceedings against him/her in circumstances which show conclusively that there has been a grave and manifest miscarriage of justice.

The third situation in which, according to the Judges, the Tribunal should be able to award compensation arises when a person is arrested or detained under the Tribunal's authority in a manner or in circumstances which constitute a violation of the right to liberty and security of person and when the conduct which gave rise to the violation is legally imputed to the Tribunal and thus to the United Nations.

Judge Jorda observes that, in the first and third situations, the United Nations is required, under generally accepted human rights norms, to compensate the individual who has been unlawfully convicted, arrested or detained.

Judge Jorda also observes that in neither of these two situations could the United Nations fulfil its legal obligations simply by paying a sum of money as compensation to the individual concerned. Legal provisions must be enacted which would give the individual a specific right to compensation, determine how the

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compensation to be paid must be calculated and establish a procedure for this purpose which meets the essential requirements of legality and respect for law.

Judge Jorda observes that, in the second situation described in his letter, the United Nations could not be held bound under existing international law to compensate an individual who may have been unlawfully detained or prosecuted as described. He states that the Judges nevertheless believe that, given the particular circumstances in which the Tribunal operates, it is desirable that the Tribunal should be able to award compensation in such situations.

Judge Jorda notes that, for the Tribunal to be able to award compensation in each of the three situations described in his letter, the Security Council would have to amend the Statute of the International Tribunal for the Former Yugoslavia to empower it to deal with questions of compensation.

Should the Security Council adopt such amendments, the General Assembly would subsequently have to approve the necessary appropriation to the Tribunal's budget.

I should be grateful if you would bring the text of this letter and its annexes to the attention of the members of the Security Council.

(*Signed*) Kofi A. **Annan**

## Annex

### Letter dated 19 September 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General

I am writing to you today to request your assistance on a matter of very great importance to the International Criminal Tribunal for the Former Yugoslavia, namely, compensation for persons who have been wrongfully prosecuted or convicted.

During recent months, the Judges have expressed concern at the plight of individuals who, after having been prosecuted and tried according to the applicable rules, have been acquitted by the Tribunal. Although the best way of clearing an accused person is to acquit him or her, under the legislation of a number of countries, anyone who has been wrongfully convicted or prosecuted can be compensated for the deprivation of liberty suffered and for the economic losses sustained due to the proceedings instituted against him or her. Persons who have been unjustly arrested or detained can also receive compensation. Such compensation — which is also codified in various international human rights instruments — is not provided for in the Statute of the International Tribunal for the Former Yugoslavia, nor in its Rules of Procedure and Evidence.

Since the International Tribunal for the Former Yugoslavia wishes, by definition, to abide fully by the internationally recognized norms relating to the rights of suspects and accused persons, the absence of any provision which would allow for awarding compensation in such situations is a cause for concern. Moreover, during the first six years of its existence, a number of people have been deprived of their liberty by the Tribunal only to be later acquitted or to have the proceedings against them terminated. It is possible that these people may file a complaint against the Tribunal on the grounds that they were deprived of their liberty and sustained direct economic losses as a result of these proceedings.

Accordingly, the issue of compensation needs to be addressed as soon as possible.

As mentioned above, the issue of compensation arises in three situations. When an individual is wrongfully convicted, when an individual is unjustly prosecuted and when an individual is unlawfully arrested or detained. These situations are dealt with below in detail.

#### Compensation for wrongfully convicted persons

The right to compensation of wrongfully convicted persons is provided for in several international human rights instruments, including, in particular, article 14, paragraph 6, of the International Covenant on Civil and Political Rights. Article 85, paragraph 2, of the Statute of the International Criminal Court, adopted in Rome on 17 July 1998, contains a provision that is virtually identical.

Since it is a subsidiary body of the Security Council, the actions of the International Tribunal for the Former Yugoslavia can be imputed to the United Nations. Consequently, since it considers itself bound by generally accepted human rights norms such as article 14, paragraph 6, of the International Covenant on Civil

and Political Rights, the United Nations will be legally bound to compensate persons whose conviction by the Tribunal is subsequently overturned.

**Compensation for unjustly prosecuted persons**

Although article 85, paragraph 3, of the Statute of the International Criminal Court gives the latter the power, in exceptional circumstances, to award compensation to persons who have been accused and subsequently acquitted, following the termination of proceedings due to a grave and manifest miscarriage of justice, there is no equivalent provision in the International Covenant on Civil and Political Rights nor in any other international human rights instrument. It cannot, therefore, be said that a right of this nature is currently part of international customary law. Accordingly, the United Nations could not be held legally bound to compensate the victims of grave and manifest miscarriages of justice in such circumstances.

However, some national systems do provide for the compensation of wrongfully prosecuted persons.

Because of the particular circumstances in which the Tribunal operates, including the fact that the accused are detained for long periods pending trial, it is in the interest of the Tribunal, and of the United Nations in general, to award compensation, at the discretion of the Tribunal, to accused persons who are acquitted or against whom proceedings are terminated. It should, however, be noted that this discretion should be exercised only in exceptional circumstances, following a "grave and manifest" miscarriage of justice.

**Compensation for unlawfully detained persons**

International human rights instruments guarantee the right to compensation of persons who have been deprived of their liberty in circumstances involving a violation of their rights, as may be seen in article 9, paragraph 5, of the International Covenant on Civil and Political Rights. Thus, if a person is arrested or detained under the authority of the Tribunal in circumstances that constitute a violation of the rights recognized in article 9, paragraphs 1 to 4, of the International Covenant on Civil and Political Rights and if the conduct giving rise to this violation is legally imputed to the Tribunal and thus to the United Nations, the latter would be legally bound to award compensation to the victim of this violation.

Since the Statute contains no provision conferring on the Judges the power to take the necessary measures to fulfil the above-mentioned obligations, several possible mechanisms have been studied, in consultation with the Office of Legal Affairs, that would offer the possibility of compensation to the persons concerned. These mechanisms include, among other things, arbitration, exceptional ruling, General Assembly resolutions recognizing limited responsibility and amendment of the Tribunal's Statute.

In this context, it must be noted that the United Nations may not evade its international obligations simply by paying a sum of money as compensation to the persons concerned. The obligations set forth in article 9, paragraph 5, and article 14, paragraph 6, of the International Covenant on Civil and Political Rights are not designed solely to provide for summary compensation to persons who are protected by these provisions, but rather to ensure that these persons have a "right to

compensation" (in the case of article 9, paragraph 5) and compensation "according to law" (in the case of article 14, paragraph 6). It is therefore necessary, in order to fulfil this obligation, to enact legal provisions that meet the essential requirements of legality and respect for law, conferring on persons wrongfully prosecuted or convicted by the Tribunal, and on those who have been unlawfully arrested or detained, a specific right to compensation.

Consequently, since the Tribunal and, in particular, the Chambers are in the best position to determine whether persons who have been wrongfully prosecuted or convicted and those who have been unlawfully arrested or detained should be compensated, the Judges consider that the Security Council should study the possibility of widening the jurisdiction of the Tribunal by amending its Statute to empower it to deal with questions of compensation.

Since any step taken in this respect must closely reflect recent developments in international human rights law, we suggest that a new article should be added to the International Tribunal's Statute, inspired by the precedent contained in article 85 of the Statute of the International Criminal Court, the text of which is also attached herewith.

Lastly, in order to adopt the best possible amendment to the International Tribunal's Statute, I should be grateful if you would draw this letter to the attention of the President and members of the Security Council for their consideration.

In addition, since the International Tribunal and the International Criminal Tribunal for Rwanda (ICTR) ought to take a similar approach to this issue, I have discussed it with Judge Navanethem Pillay, President of ICTR. She told me that the ICTR judges also envisaged using the same approach to seeking an amendment to the Statute of that Tribunal, and that a separate letter prepared with that intention would shortly be addressed to you.

Of course, the envisaged amendments will have administrative and budgetary implications for the United Nations. In this context, the Tribunal has already requested the opinion of Mr. Joseph Connor, Under-Secretary-General for Management, and expects to receive his reply soon.

If you have any other questions regarding this request, or if you wish to obtain additional information on the right to compensation of persons who have been wrongfully prosecuted or convicted or persons who have been unlawfully arrested or detained, I remain at your disposal to discuss them.

In that regard, I should like to draw to your attention a detailed document prepared by the Registry on the question of compensation, which is attached to the letter addressed to Mr. Connor.

(*Signed*) Claude **Jorda**
President

## Enclosure

### Article 85 of the Statute of the International Criminal Court

**Compensation to an arrested or convicted person**

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.